

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

74-2478

B  
Pages  
6

---

United States Court of Appeals  
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

*against*

PETER BECKERMAN,

*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

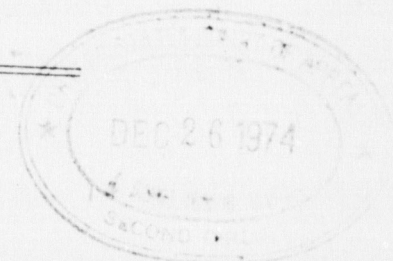
---

JOINT APPENDIX

---

ORANS, ELSSEN & POLSTEIN  
*Attorneys for Defendant-Appellant*  
One Rockefeller Plaza  
New York, New York 10020

PAUL CURRAN  
United States Attorney  
Southern District of New York  
United States Court House  
Foley Square  
New York, New York 10007



**PAGINATION AS IN ORIGINAL COPY**



## INDEX

	Page
Docket Entries.....	A1
Notice of Motion.....	A4
Affidavit of Robert Polstein in Support of Motion.....	A6
Exhibit A--Excerpt from Trial Transcript.....	A18
Exhibit B--Excerpts from Trial Transcript.....	A38
Exhibit C--Excerpt from Trial Transcript.....	A43
Exhibit D--Judge's Charge.....	A45
Judge Motley's Oral Decision.....	A73
Order Denying Motion to Dismiss Indictment.....	A76





## DOCKET ENTRIES

D. C. Form No. 10  
CRIMINAL DOCKET

JUDGE OWEN

JUDGE MOTLEY

R.O.

7-3 CRIM. 939

TITLE OF CASE		11-7-74	ATTORNEYS
THE UNITED STATES		For U.S.:	
PETER BECKERMAN		Nicholas Figueroa, AUSA	
		264-6423	
		For Defendant:	
		Joan Golbert, Esq.	
		30 E. 42nd St.	
		New York, N.Y. 10007	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
Fine,		11/7/74	11/7/74		
Clerk,		11/7/74	11/7/74		
Marshal,					
Attorney,					
X <del>XXXXXXXXXXXX</del> 21					
X <del>XXXXXXXXXXXX</del> 12,841.(a)(1)					
Distr. & possess. w/intent					
to distr. Schedule II (Cocaine)					
(One Count)					

DATE	PROCEEDINGS
10-4-73	Filed indictment. ✓
10-15-73	Def't. (atty. presnt) Pleads not guilty. Bail continued. Case assigned to Judge Motley for all purposes. MacMahon, J.
✓ Nov. 15-73	Filed motion for disclosure of electronic surveillance & for pre-trial hearing.
✓ Nov. 15-73	Filed motion for disclosure of Grand Jury Proceedings
✓ Nov. 15-73	Filed motion for discovery and inspection
✓ Nov. 15-73	Filed notice of motion for bill of particulars
✓ Nov. 15-73	Filed brief in support of motion for disclosures of C.J. minutes
✓ Nov. 15-73	Filed brief in support of motion for discovery

## Docket Entries

P 2

73 CR-939

DATE	PROCEEDINGS	CLERK'S FEE	
		PLAINTIFF	DEFENDANT
11-15-73	Filed brief in support of motion for bill of particulars.		
11-15-73	Filed brief in support of motion for disclosure of electronic surveillance.		
1-17-74	Filed Govt's notice of readiness for trial		
2-21-74	Filed order extending bail limits.....Motley, J.		
3-22-74	Filed affdvt. & notice of motion to suppress all evidence....		
3-22-74	Filed def't's memorandum of law...		
5-14-74	Filed Courts Ex 3, 4, 5. Ordered sealed & impounded.....Motley, J.		
5-8-74	JURY TRIAL BEGUN.....Motley, J.		
5-9-74	Trial cont'd.		
5-10-74	Trial cont'd. Mistrial declared by Court. Jury unable to agree upon a verdict.		
5-15-74	Filed Govt's requests to charge..		
5-15-74	Filed def't's supplemental trial memorandum.		
5-15-74	Filed Govt's supplemental request to charge.		
5-15-74	Filed transcript of record of proceedings dated MAY 7-74.		
5-15-74	Filed def't's requests to charge.		
5-15-74	Filed Govt's memorandum of law in opposition to motion to inspect.		
5-15-74	Filed affdvt. of Nicholas Figueras, AUSA in response to pre-trial motions.		
5-15-74	Filed def't's trial memorandum.		
5-15-74	Filed def't's voir dire..		
5-16-74	Filed affdvt. of U.O. Carey, AUSA in opposition to suppression motion.		
7-1-74	Filed Notice of Reassignment to O'Connell.		

cont'd on page 43



### Docket Entries

**page 43**

**73 Cr.**

DATE	PROCEEDINGS
7-10-74	Filed transcript of record of proceedings dated May 8, 9, 10, 1974.
7-8-74	Filed transcript of record of proceedings dated May 6, 1974. <del>Filed transcript of record of proceedings dated May 8, 9, 10, 1974.</del>
9-5-74	Filed Deft's. affidavit and notice of motion for an order dismissing the indictment. ret. 4-20-74.
9-9-74	Filed Deft's. memo. of law in support of motion to dismiss the indictment.
9-20-74	Filed Deft's. reply memorandum of law.
10-7-74	Filed Deft's. notice of appeal from the decision of Judge Motley, dated 9-27-74 denying deft's. motion to dismiss the indictment. Mailed notice to Peter Beckerman, 57 W. 58th St. N.Y.C. 10019 and U.S. Attorney's Office.
10-29-74	Filed transcript of record of proceedings dated 9-27-74.
10-30-74	Filed ORDER that for the reasons stated at the hearing held on 9-27-74, deft's. post-trial motion to dismiss the indictment is denied.....Motley, J. (mailed notice)
11-7-74	Filed Consent ORDER extending bail limits to include the Eastern District of New York; bail limits are further extended to include travel to the island of Nassau in the Bahamas for the period 11-27-74 to 12-8-74.....Owen, J.
11-7-74	Filed deft's. amended notice of appeal from the order of Judge Motley filed on 10-30-74. Mailed notice to Peter Beckerman 57 W. 58th St. N.Y.C. 10019 and U.S. Attorney's Office.

NOTICE OF MOTION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
UNITED STATES OF AMERICA,

-against-

PETER BECKERMAN,

Defendant.

Docket No. 73 CR. 939  
(RO)

NOTICE OF MOTION

-----  
SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert Polstein, Esq. duly sworn to the 4th day of September, 1974, and upon the exhibits thereto and all other prior papers and proceedings heretofore had herein, the undersigned will move this Court before the Hon. Richard Owen, United States District Court Judge, at the United States Courthouse at Foley Square, New York, on the <sup>20th</sup>~~16th~~ day of September, 1974, at <sup>2:15</sup>~~10:00~~ a.m. in the forenoon or as soon thereafter as counsel can be heard for an order dismissing the indictment against the defendant based upon the denial of his constitutional right against double jeopardy.

Dated: September 4, 1974

ORANS, ELSEN & POLSTEIN

By: Robert Polstein

Robert Polstein  
A Member of the Firm  
One Rockefeller Plaza  
New York, New York 10020  
212-586-2211



*Notice of Motion*

TO: HON. PAUL CURRAN  
United States Attorney  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York

CLERK, U. S. DISTRICT COURT  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York

AFFIDAVIT OF ROBERT POLSTEIN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
UNITED STATES OF AMERICA,

Plaintiff,

Docket No. 73 CR. 939  
(RO)

-against-

PETER BECKERMAN,

AFFIDAVIT

Defendant.

-----

STATE OF NEW YORK        )  
                                  )        ss.:  
COUNTY OF NEW YORK     )

ROBERT POLSTEIN, being duly sworn, deposes and says:

I am a member of Orans, Elsen & Polstein, attorneys for defendant, have been in charge of the defense of this indictment since we were retained, am fully familiar with all facts and prior proceedings herein, and submit this affidavit in support of defendant's motion to dismiss the indictment because further prosecution would violate the double jeopardy clause of the United States Constitution.

After a two-day trial of this simple, one-count indictment, the jury spent approximately four hours in actual deliberations before it was discharged by the Court as "deadlocked", over defense counsel's objections, and despite a definite indication



## Affidavit of Robert Polstein

from the jury that it lacked sufficient evidence to convict. The following excerpt from the trial transcript makes it crystal clear that, with additional time for deliberation, the jury might well have acquitted defendant (Exhibit A; 107:13-23):\*

"THE COURT: Ladies and gentlemen I have your note which reads 'We the jury are deadlocked.' Does that mean that you are not able to reach a verdict?

"THE FORELADY: It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer" (emphasis added).

We submit that, under those circumstances, the Court should not have precipitously discharged the jury, but should have granted defense counsel's request to charge the jury again as to burden of proof and sufficiency of evidence (108:12-20). Certainly, the jury clearly indicated that with a little more time an acquittal was probable, and we urge that to again force this defendant to go to trial on the same charge would constitute double jeopardy. Accordingly, this motion is brought to dismiss the indictment.

BACKGROUND

Peter Beckerman is a 25-year-old real estate broker who has never been convicted of a crime. A casual friend, one Mary

\* The entire transcript dealing with the jury's deliberations is annexed hereto as Exhibit "A", and is paginated inside the upper left-hand margin with the legend "rkrf 93" to "rkrf 112". In this affidavit, references to the transcript will be designated by page and line. Thus, the excerpt quoted above, cited "107:11-23" refers to page "rkrf 107, lines 11 through 23".

*Affidavit of Robert Polstein*

Adler had been telephoning defendant constantly for a week begging him to obtain some cocaine for her. On the evening of September 18, 1973, Beckerman went to Mary Adler's apartment with a small amount of cocaine. A federal undercover agent named Sam Meale was present and attempted to buy the cocaine from Beckerman. Defendant refused to sell it -- and, in fact, refused to let Meale touch, taste or smell the cocaine -- and left the apartment. Several blocks away he was arrested by Meale's partner.

Beckerman was subsequently indicted and charged with one count of possession with intent to sell approximately 28 grams of cocaine, in violation of Title 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A).

On November 26, 1973, defendant's prior counsel made omnibus motions for pre-trial discovery and inspection (copies of which are on file with this Court). As part of those motions the defense requested the following information:

"5. All material known to the Government or which, through due diligence could be learned from the Federal Bureau of Investigation or Government agencies or agents or prospective witnesses in this case which is arguably exculpatory material or favorable or useful to defendant, or which may lead to that exculpatory material, as required by Brady v. Maryland, 373 U.S. 83. This material shall include, but not be limited to, statements of witnesses, criminal records of prospective Government witnesses, reference to informers relevant to a defense of entrapment, and character references laudatory to the accused" (emphasis added).



*Affidavit of Robert Polstein*

On the same date, defense counsel moved for a bill of particulars, requesting the following information inter alia:

"4. Specify the name or names of the person or persons to whom defendant is alleged to have distributed the above narcotic drug; (a) specify whether defendant is alleged to be acquainted with such person or persons; (b) specify whether such person or persons are agents or enforcements for the United States Government."

"7. Specify whether an undercover agent or agents or informer or informers aided or participated in the investigation and/or arrest of defendant, and if so, set forth the name or names of such person or persons" (emphasis added).

In opposition to those motions, the Government submitted the affidavit of Assistant United States Attorney Figueroa (on file with this Court) in which it refused to reveal the identity of any "informers relevant to the defense of entrapment" and identified Special Agent Meale as the only Government agent involved (paragraphs "4" and "10" of Figueroa affidavit). The Court did not direct further particularization. Thus, after the conclusion of pre-trial skirmishing, the defense had no way of ascertaining that Mary Adler was -- as it later developed -- a paid Government informer.

After I was retained as defense counsel herein, I interviewed Mary Adler and discussed quite fully and frankly with her the elements of our entrapment defense. Obviously, I never would have been so open with her if I had any inkling that she was a Government informer. As was revealed during the course of the trial, Miss Adler subsequently met with the Assistant United

*Affidavit of Robert Polstein*

States Attorney in charge of the prosecution of this case and reported my conversation to him.

THE TRIAL

Immediately following the conclusion of a suppression hearing, this two-day trial commenced before Judge Motley, and the following evidence with respect to Mary Adler was adduced (see excerpts from trial transcript annexed hereto as Exhibit B; 31:8-14, 32:6-33:6, 46:18-47:2):

"Q Is Mary Adler an informer for your bureau?

THE WITNESS: Do I have to answer that?

A Yes, she is.

Q Does she have a number assigned to her by the Drug Enforcement Administration?

A Yes, she does.

Q What is Mary Adler's informer's number?"

\* \* \*

"THE WITNESS: I believe I do. I might not recall it exactly. It's SC 10137 or 87.

Q SC 1-30187?

A Yes, I believe so.

Q That's Mary Adler's number?

A Yes.

Q When did Mary Adler become an informer for the DEA?

A I personally don't know that.



*Affidavit of Robert Polstein*

Q When did you meet Mary Adler for the first time?

A I saw her approximately a week or two weeks prior to September 18th.

Q Who introduced you?

A Agent Lightcap.

Q Where did you meet Mary Adler?

A I wasn't formally introduced to her until September 18th.

Q But you met this young woman through your partner, Agent Lightcap; is that right?

A That is correct.

Q Did Lightcap tell you, 'This is Mary Adler'?

A Yes, he did.

Q Did he tell you she was an informer for the DEA?

A Yes, he did.

Q Did he tell you that she was trying to set up a cocaine deal for him?"

\* \* \*

"Q Do you know whether Mary Adler was being paid by the DEA for the service she was performing as an informer?

A I found out later that she was.

Q She was being paid. And how did you find that out?

A After the arrest of Peter Beckerman in discussing the case with Agent Lightcap. During this time is when I found out that the informant had been paid."

*Affidavit of Robert Polstein*

Obviously, under these circumstances, Mary Adler was a key prosecution witness. The trial prosecutor had Mary Adler actually present in the Court anteroom, but chose not to call her as a witness. I established this fact on trial by calling the case agent as the first defense witness (see Exhibit C; 213:24-214:8):

"Q Agent Lightcap, is Mary Adler presently in this building, to your knowledge?

A Yes, she is.

MR POLSTEIN: No further questions.

THE COURT: Do you have any cross examination?

MR. CAREY: No, your Honor.

THE COURT: You may come down.

(Witness excused.)"

Two independent defense witnesses testified that Mary Adler had entrapped defendant. Defendant testified in his own behalf at length. The Government did not call Mary Adler as a rebuttal witness.

Despite the brevity of the trial, Judge Motley charged the jury for one hour (see Judge's charge, Exhibit D annexed). During her instructions to the jury the Court charged that "There has been testimony with regard to the use of a person referred to as an informer or an informant and that was Mary Adler" (Exhibit D; 73:17-19), as to the Government's failure to call Mary Adler as a witness (Exhibit D; 74:12-22) and as to the entrapment defense (Exhibit D; 79:10-21; 85:23-88:23).



THE JURY'S DELIBERATIONS

The jury commenced deliberations at 2:30 p.m. (Exhibit A; 94:19). Forty-five minutes later, at 3:20 p.m., the jury sent in a note stating that they "would like to hear the Judge's charge in regard to Mary Adler" (Exhibit A; 95:24-96:3), and for the next 20 minutes, the Court repeated its instructions "with respect to Mary Adler" (Exhibit A; 99-102).

At 3:40 p.m. the jury again retired to resume its deliberations (Exhibit A; 103:3). A little less than two hours later, the jury requested to have testimony "in regard to phone calls to Mary Adler by Mr. Beckerman in Mary Adler's apartment" read (Exhibit A; 103:5-19). After completion of that rereading, the jury went to dinner at 6:30 p.m., and did not resume its deliberations until 8:00 p.m. (Exhibit A; 105:19-20).

Now, from the foregoing, it is patently evident that the jury was sorely troubled by the Government's failure to call Mary Adler as a witness and was having grave difficulties in finding that the Government had established its burden to prove the absence of entrapment beyond a reasonable doubt, as required by the Court's charge. In this context, what transpired after the jury delivered its last note becomes even more meaningful.

At 9:15 p.m., the jury sent in a note reporting that it was "deadlocked" (Exhibit A; 105:21-106:5). As of that point -- exclusive of the rereading of the Court's charge and portions

*Affidavit of Robert Polstein*

of the testimony, and the dinner recess -- the jury had spent only four hours in actual deliberations.

The Government requested "that the Court give the jury a modified Allen charge", pointing out that, "they have only been deliberating a little over three hours" (Exhibit A; 106:6-15). The Court refused the Government's request, and brought in the jury, at which time the following colloquy occurred (Exhibit A; 107:13-108:21):

"THE COURT: Ladies and gentlemen I have your note which reads 'We the jury are deadlocked'.

Does that mean that you are not able to reach a verdict, and the question I want to put to you whether you feel with a little more time you might be able to reach a verdict?

THE FORELADY: It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer.

THE COURT: The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?

THE FORELADY: The way it seems now, it doesn't seem as though we will be able to.

MR. POLSTEIN: May I make a suggestion?

THE COURT: No, you may not.

Thank you very much. The court is going to declare a mistrial, the jury is excused.

We have arranged for a bus to take you home. Are they going to be here at 10:00 o'clock?

The jury is excused.



*Affidavit of Robert Polstein*

MR. POLSTEIN: Before the jury is excused, in view of the forelady's statement to the Court, I would respectfully request the Court to read the jury again your charge on burden of proof. I think that the foreman or forelady of the jury has expressed to the Court a view of the jury that can be cleared up. This jury has been out since 2:35. You just heard that they felt they don't have enough proof. I wonder if you would charge them again the quantum of proof.

THE COURT: The jury is dismissed."

We submit that when the forelady stated in open court that, "Our biggest problem is we don't think we have enough evidence" this was tantamount to an announcement that the Government has failed to sustain its burden of proof. Just as obviously, when the forelady stated that, "maybe another time, another day we may be clearer", the jury was asking for additional time to deliberate. At that point, it was evident that if the Court repeated its instructions with regard to "burden of proof" and "reasonable doubt" an acquittal would probably have resulted. I made such a request. The Court refused my request, the jury was summarily discharged and a mistrial was declared by the Court on its own volition.

As is pointed out in our accompanying memorandum of law, a trial court may not arbitrarily dismiss a jury in the absence of very extraordinary and stringent circumstances clearly demonstrating that it is hopelessly deadlocked. Clearly no such circumstances existed here. Despite the forelady's unequivocal statement that "maybe another time, another day we may be clearer"

the Court decided sua sponte that this jury was incapable of reaching a decision. Judge Motley's own explanation of why she discharged the jury is at variance with the forelady's statement (Exhibit A; 109:20-23):

"The forelady was plainly asked with a little more time would they be able to reach a verdict and she was intending to say they couldn't but I think went a little beyond that" (emphasis added).

The hour was not late, buses were already standing by (Exhibit A; 108:9-10), and certainly some additional time could have been granted to the jury to continue its deliberations. The jury, by its notes to the Court, had telegraphed that it was sorely troubled by the Government's failure to call Mary Adler as a witness. Now, upon a retrial, the Government could cure this defect in its case. Under the circumstances, to subject defendant to another trial would be manifestly unfair.

In short, the Government took the chance that it could overcome defendant's entrapment defense in the absence of Mary Adler as a rebuttal witness. The witness was present in court, yet the prosecution chose not to call her to the stand. Having gambled and lost, the Government should not now be given another opportunity to attempt to convict this defendant upon the same charges.

#### CONCLUSION

For the foregoing reasons, and pursuant to the decisional law set forth in our accompanying memorandum of law, it is



*Affidavit of Robert Polstein*

respectfully submitted that to subject this defendant to another trial upon this same charge would constitute double jeopardy and, accordingly, the indictment herein should be dismissed.

*Robert Polstein*

ROBERT POLSTEIN

Sworn to before me this  
4th day of September, 1974

*Abigail A. Reese*

ABIGAIL A. REESE  
Notary Public, State of New York  
No. 21-4502054  
Qualified in New York County  
Commission Expires March 29, 1978

EXHIBIT A--EXCERPT FROM TRIAL TRANSCRIPT ANNEXED TO  
AFFIDAVIT OF ROBERT POLSTEIN

1 rkrf 93

2 the Government must prove beyond a reasonable doubt that  
3 such inducement was not the cause or creator of the crime.  
4 That is, the Government must prove that defendant had  
5 been predisposed and so forth.

6 Anything else?

7 MR. FERRARA: We respectfully except to that  
8 portion of the charge.

9 THE COURT: All right.

10 (In open court.)

11 THE COURT: Ladies and gentlemen, when you go  
12 in the jury room, you can send for any of the exhibits  
13 you would like to see or have any of the testimony read  
14 back.

15 I want to caution you that you are not to  
16 reveal the standing of the jurors, that is, the split of  
17 the vote, if that should occur at any time to anyone, not  
18 even to the Court and of course you should communicate with  
19 no one except by handing a note to the marshals who will  
20 be in attendance.

21 If you want to say anything to anybody, give a  
22 note to the marshal and he will give it to me.

23 At this time the lawyers on both sides have  
24 agreed to excusing Mr. Schechner. Mr. Schechner pointed  
25 out earlier today that he is an orthodox Jew and he would



Exhibit A

1 rkrf 94

2 like to return to his home to prepare for his religious  
3 services tonight so we are going to excuse Mr. Schechner  
4 now and substitute Alternate Juror No. 1, Mrs. Louise Reed.

5 Mr. Schechner, do you have anything in the jury  
6 room?

7 MR. SCHECHNER: Yes, a hat and a raincoat.

8 THE COURT: Would you get that?

9 MR. SCHECHNER: I want to extend my appreciation  
10 to the Court and counsel and the jurors for a very educational  
11 experience.

12 THE COURT: Thank you very much and I want to  
13 thank you again for your service on this jury.

14 You are excused.

15 THE COURT: Mrs. Reed, would you move into Juror  
16 No. 7's seat.

17 Would the clerk please swear the marshal.

18 (Marshal sworn.)

19 (Jury commenced deliberations at 2:35 p.m.)  
20  
21  
22  
23  
24  
25

Exhibit A

1 rkrf 95

2 THE COURT: Gentlemen, I want to say this. You  
3 are not to leave this floor because if the jurors send out  
4 a note, we don't want to be running around the courthouse  
5 trying to find you and the condition of the elevators does  
6 not permit you to be running up and down.

7 MR. POLSTEIN: I suggested to Mr. Carey we agree  
8 upon the exhibits and leave them in one place.

9 THE COURT: There are not that many. There are  
10 only four.

11 MR. CAREY: Four Government, your Honor.

12 MR. POLSTEIN: We just have three. The clothes,  
13 the real estate license and the telephone toll charges.

14 THE COURT: Hold on to each of your own exhibits  
15 and if they send for them, we will get them.

16 (Recess.)

17 (3:20 p.m., a note was received from the jury.)

18 (In open court.)

19 (In the robing room.)

20 THE COURT: We have a note from the jurors which  
21 will be marked Court's Exhibit 8.

22 (Court's Exhibit 8 marked for  
23 identification.)

24 THE COURT: "Jury would like to hear the testimony  
25 of Mr. Lightcap in regard to the surveillance of Peter



1 rkrf 96

2 Beckerman before September 18, 1973. Also jury would like  
3 to hear the Judge's charge in regard to Mary Adler,  
4 Beverly Whittesley, foreman."

5 I don't know what they mean by the charge in  
6 regard to Mary Adler except the entrapment charge.

7 MR. POLSTEIN: I would assume that is what they  
8 mean.

9 THE COURT: That is the only time I gather that  
10 I mentioned her name in actually reading the charge.  
11 I think in the beginning. In the beginning where I gave  
12 the essence of the defendant's claims, I just said  
13 Government's agents and what the claim was and in the  
14 entrapment charge I mentioned Mary Adler.

15 MR. CAREY: I believe you also mentioned Mary  
16 Adler in connection with your charge on the availability  
17 of witnesses, stating that the jury can take no inference  
18 for or against the Government or for or against the defendant  
19 as a result of either parties failure to call Miss Adler.

20 THE COURT: I can say to the jurors I mentioned  
21 her in connection with the entrapment charge and the  
22 failure to call a witness charge. Which of those do you  
23 have in mind?

24 MR. CAREY: I would request that both of those  
25 be read.

1 rkrf 97

2 MR. POLSTEIN: I think the Judge has to inquire  
3 of the jury because she can't volunteer anything unless  
4 they ask.

5 THE COURT: I think we should have it clarified  
6 because I mentioned her specifically when I came to the  
7 failure, there had been a lot of talk about the Government's  
8 failure to call the informant Mary Adler and then defendant  
9 claims he was entrapped by Mary Adler and other Government  
10 agents.

11 MR. CAREY: Your Honor, it is my recollection there  
12 is no testimony of surveillance of the defendant by  
13 Agent Lightcap prior to September 18th.

14 THE COURT: They do use the word surveillance.  
15 Do you recall any such testimony?

16 MR. POLSTEIN: I had asked him was there any  
17 surveillance. I believe he said not before that night,  
18 but in that connection he mentioned his three conversations  
19 with Mary Adler.

20 THE COURT: Yes. That is what I had thought they  
21 had in mind.

22 MR. POLSTEIN: I was trying to pin him down  
23 to dates, knowing full well that Peter was in Boston  
24 at the time.

25 THE COURT: I will have to ask them about that,



1 rkrf 98

2 too, then.

3 (In open court, jury present.)

4 THE COURT: Ladies and gentlemen, I have your  
5 note which reads as follows:

6 "Jury would like to hear the testimony of  
7 Mr. Lightcap in regard to the surveillance of Peter  
8 Beckerman before September 18, 1973."

9 There is no testimony regarding surveillance  
10 of Peter Beckerman before September 18th. There is  
11 testimony regarding conversations I believe with Mary  
12 Adler about Peter Beckerman before that time.

13 You will have to let me know whether that is  
14 what you have in mind, whether you are talking about  
15 surveillance? Surveillance means following a person and  
16 the person doesn't know he is being watched.

17 Is that what you had in mind?

18 THE FORELADY: We thought there was some testimony  
19 of that fact that Peter Beckerman had been under surveillance  
20 for a day or two before September 18th. Maybe it was by  
21 the other agent.

22 THE COURT: I think the agent was asked and he  
23 said he was not under surveillance and that is what we  
24 mean by surveillance, where an agent follows a person  
25 who looks at what he does for a day or so. I think the

1 rkrf 99

2 agent was asked whether he had Beckerman under surveillance  
3 but he answered no. There was testimony, I believe, with  
4 regard to his talking, one of them talking to Mary Adler  
5 before.

6 The next part of your note reads, "Jury would  
7 like to hear the Judge's charge in regard to Mary Adler."

8 Now, I mentioned Mary Adler twice. The first  
9 time with respect to the Government's failure to call  
10 her. The law with respect to failure to call a witness.  
11 Then I mentioned Mary Adler with respect to the law of  
12 entrapment. Which of those two did you want read?

13 (Jurors say "Both.")

14 THE COURT: As I said at the time there had been  
15 a great deal of discussion about the Government's failure  
16 to call Mary Adler as a witness and as I told you, the  
17 law is that if the Government has failed to call a witness  
18 who is equally available to both sides, you may not  
19 draw an inference that his or her testimony would have  
20 been unfavorable to the Government.

21 There is no presumption against the Government  
22 from its failure to call a witness if it should appear  
23 to you that their testimony would be merely cumulative  
24 or repetitive and have no greater value than that of  
25 witnesses who have testified.



1 rkrf 100

2           The law does not impose upon a defendant the  
3 duty to call as witnesses any persons who are shown to have  
4 been present at any of the events involved in the evidence,  
5 or who may appear to have some knowledge of the matters in  
6 question.

7           Both sides have the right to interview witnesses  
8 at any time before or during the trial.

9           Then with respect to entrapment, you recall that  
10 I said it was defendant's defense here that he had been  
11 entrapped by Mary Adler and other Government agents into  
12 committing the crime and therefore I must instruct you as  
13 to the law regarding entrapment and I pointed out that  
14 the word entrapment has a legal meaning, a technical  
15 meaning, not that of popular speech or colloquial ordinary.  
16 usage.

17           Criminal activity is such that sometimes stealth  
18 and strategy are necessary methods to be used by law  
19 enforcement officers. The function of law enforcement  
20 is not only the prevention of crime, but also the detection  
21 and apprehension of criminals. Manifestly, that function  
22 does not include the manufacturing of crime by Government  
23 agents.

24           The defense of entrapment is based upon the policy  
25 of the law not to ensnare or entrap innocent persons into

## Exhibit A

1 rkrf 101

2 the commission of a crime, but a line must be drawn between  
3 the entrapment of the unwary innocent and the trap for  
4 the unwary criminal. A basic feature of entrapment is,  
5 that the idea or design of committing a crime originated  
6 with a law enforcement officer or Government informer  
7 rather than with a defendant. That a defendant had no  
8 predisposition, intent or purpose to commit the alleged  
9 offense and that the law enforcement officer or Government  
10 employee implanted in the mind of an innocent person the  
11 disposition to commit the alleged offense and instigated  
12 and incited its commission in order that the defendant  
13 might be arrested and prosecuted.

14 If you find that an agent or employee of the  
15 Government merely afforded a favorable opportunity to  
16 the defendant for the commission of the alleged crime,  
17 such conduct on the part of the Government does not constitute  
18 entrapment. Entrapment would only occur if you find that  
19 the Government's agent induced the defendant to commit  
20 the crime charged in the indictment and that the criminal  
21 conduct of the defendant was a product of the Government's  
22 activity.

23 If the jury finds any credible evidence creating  
24 the reasonable possibility that a Government agent or  
25 employee instigated and incited or otherwise induced the



1 rkrf 102

2 the defendant to commit the crime charged, then the  
3 Government must prove beyond a reasonable doubt that such  
4 inducement was not the cause or creator of the crime. That  
5 is, the Government must prove that the defendant had been  
6 predisposed and willing to commit the crime.

7 In other words, the same thought, while a  
8 defendant is not required to prove his entrapment beyond  
9 a reasonable doubt, the Government must prove its absence  
10 beyond a reasonable doubt and if you have a reasonable  
11 doubt as to the absence of entrapment and find a reasonable  
12 possibility of entrapment, you must acquit the defendant.

13 If the prosecution has satisfied you beyond  
14 a reasonable doubt that defendant was ready and willing  
15 to commit the offense charged and was merely awaiting a  
16 favorable opportunity to commit the offense, then you may  
17 find that the inducement, if any, which brought about the  
18 actual offense was no more than the providing of what  
19 appeared to the defendant to be a favorable or timely  
20 or convenient opening for the criminal activity in which  
21 that defendant engaged.

22 In such circumstances, you may find that the  
23 Government's agent has not seduced an innocent person,  
24 but has only provided the means for the defendant to effec-  
25 tuate or realize his own then existing purpose.

rkrf 103

*Exhibit A*

You may return to the jury room.

(Jury leaves room at 3:40 p.m.)

(Recess.)

(5:35 p.m., note received from the jury.)

(In open court.)

THE COURT: We have a note from the jury. It will be marked Court's Exhibit 9.

(Court's Exhibit 9 marked for identification.)

THE COURT: Gentlemen, we have a note from the jurors which has been marked Court's Exhibit 9 and reads as follows:

"We would like to hear the testimony by Mr. Lightcap and Mr. Meale in regard to phone calls to Mary Adler by Mr. Beckerman in Mary Adler's apartment, what was said and what time the calls were made on September 18th," and I guess that is substantially the testimony of Lightcap -- well, Meale, I guess it is.

MR. POLSTEIN: Both.

THE COURT: Were there calls made while Lightcap was there?

MR. POLSTEIN: Yes.

THE COURT: The reporter will have to find that.

Also the testimony of Peter Beckerman with regard



1 rkrf 104

2 to the calls he received from Mary Adler on September  
3 18th in his office, what was said and what time the calls  
4 were made and testimony by Miss Burns in regard to the  
5 time Mary Adler called Peter Beckerman in his office.

6 Would you swear in the new marshals.

7 (Marshals sworn.)

8 (Pause.)

9 MR. CAREY: If there is a question which is  
10 objected to and the question is sustained, will the reporter  
11 read that question?

12 THE COURT: No. They know that.

13 (Jury present.)

14 THE COURT: Ladies and gentlemen, we have your  
15 note which was marked Court's Exhibit 9 which reads as  
16 follows:

17 "Would like to hear the testimony of Mr. Lightcap  
18 and Mr. Meale in regard to phone calls to Mary Adler by  
19 Mr. Beckerman in Mary Adler's apartment, what was said,  
20 what time the calls were made on September 18th. Also  
21 the testimony of Mr. Peter Beckerman in regard to the calls  
22 he received from Mary Adler on September 18th at his  
23 office, what was said and what time the calls were made  
24 and testimony by Miss Burns in regard to the time that  
25 Mary Adler called Peter Beckerman in his office."

1 rkrf 105

2 The reporter has taken the time to find that  
3 testimony and he will now read it.

4 (Testimony read.)

5 The reporter that is going to read  
6 this hasn't taken the early part, it was taken by another  
7 reporter so he may have to pause as he goes along while he  
8 reads somebody else's notes.

9 (Testimony read.)

10 THE COURT: You may return to the jury room,  
11 ladies and gentlemen.

12 THE COURT: I gather the jurors will be going to  
13 dinner in ten minutes .

14 MR. POLSTEIN: May we know where they are going  
15 so we can avoid that restaurant?

16 THE COURT: We will find out in a few minutes.

17 THE COURT: The jury is going to Aldo's.

18 (Recess.)

19 (At 6:30 p.m., an evening recess was taken.)

20 (Jury resumed its deliberations at 8:00 p.m.)

21 (9:15 p.m., a note was received from the jury.)

22 (In open court.)

23 THE COURT: Gentlemen, we have a note from the  
24 jury. We will mark it Court's Exhibit 10.

25 (Court's Exhibit 10 marked for



1 rkrf 106

2 identification.)

3 THE COURT: The note reads as follows:

4 "We the jury are deadlocked," which I gather  
5 means they can't reach a verdict so we will bring them in.

6 MR. CAREY: Your Honor, the Government would  
7 request that the Court give the jury a modified  
8 Allen charge.

9 THE COURT: I don't know what a modified Allen  
10 charge is. You mean the Allen charge?

11 MR. CAREY: Yes.

12 THE COURT: I think the jury has indicated that  
13 they are deadlocked.

14 MR. CAREY: They have only been deliberating  
15 a little over three hours.

16 THE COURT: Three hours? The jury went out at 2:35  
17 It is now 9:25.

18 MR. CAREY: Your Honor, I am not counting the  
19 time when they were in the courtroom. I am counting the  
20 time when they were in their jury room when they were out  
21 of the presence --

22 THE COURT: We reread a great deal of the record  
23 to them. I have reread the charge on entrapment to  
24 them and I read the Government's failure to call a witness  
25 and the significance of that and the rereading of that

1 rkrf 107

2 testimony took at least 50 minutes. You have to count that  
3 as part of their deliberations. I don't think it is fair  
4 to say they weren't deliberations. We were rereading  
5 testimony which is part of their deliberations. We were  
6 rereading a part of the charge.

7 This says they are deadlocked and it is a  
8 one count case.

9 MR. CAREY: I have nothing further to say, your  
10 Honor.

11 THE COURT: Bring in the jury.

12 (Jury present.)

13 THE COURT: Ladies and gentlemen I have your note  
14 which reads "We the jury are deadlocked."

15 Does that mean that you are not able to reach a  
16 verdict, and the question I want to put to you whether  
17 you feel with a little more time you might be able to  
18 reach a verdict?

19 THE FORELADY: It is very hard to say. We are  
20 all very tired at this time and our biggest problem is  
21 we don't think we have enough evidence and this is our  
22 biggest hassle and maybe another time, another day we may  
23 be clearer.

24 THE COURT: The question I asked you was whether  
25 you thought with more time you would be able to reach



1 rkrf 108

2 a verdict, so the answer is no, is that it?

3 THEFORELADY: The way it seems now, it doesn't  
4 seem as though we will be able to.

5 MR. POLSTEIN: May I make a suggestion?

6 THE COURT: No, you may not.

7 Thank you very much. The court is going  
8 to declare a mistrial, the jury is excused.

9 We have arranged for a bus to take you home.  
10 Are they going to be here at 10:00 o'clock?

11 The jury is excused.

12 MR. POLSTEIN: Before the jury is excused,  
13 in view of the forelady's statement to the Court, I would  
14 respectfully request the Court to read the jury again your  
15 charge on burden of proof. I think that the foreman or  
16 forelady of the jury has expressed to the Court a view of  
17 the jury that can be cleared up. This jury has been out  
18 since 2:35. You just heard that they felt they don't  
19 have enough proof. I wonder if you would charge them  
20 again the quantum of proof.

21 THE COURT: The jury is dismissed.

22 (Jury leaves courtroom.)

23 MR. POLSTEIN: Is there a prohibition by  
24 my talking to the jury?

25 MR. CAREY: That was my question also. I

1 rkrf 109

2 understand it is permissible to speak to the jury at this  
3 time.

4 THE COURT: I usually say the thing to do is not  
5 to speak to the jury. I don't know if they want to be  
6 bothered by lawyers speaking to them.

7 MR. CAREY: If we ask them and they consent to  
8 speak to us, will that be acceptable to your Honor?

9 THE COURT: As I have said, I don't want to  
10 encourage that kind of thing, but it seems to me as I have  
11 said, the jury sent out this note saying that they were  
12 deadlocked. I asked the forelady of the jury whether  
13 with a little more time of course they could reach a  
14 verdict. Instead of answering that question, she went  
15 on to tell us what their deliberations were and that of cours  
16 should not have been done so in that case, I think it was  
17 proper to dismiss the jury for a mistrial anyway because  
18 they revealed the problems of the jury which I don't  
19 believe was the proper thing.

20 The forelady was plainly asked with a little more  
21 time would they be able to reach a verdict and she was  
22 intending to say they couldn't but I think went a little  
23 beyond that.

24 MR. POLSTEIN: If your Honor pleases, at this  
25 time the defense renews its motion for a directed verdict



1 rkrf 110

2 of acquittal.

3 As your Honor charged the jury and charged  
4 the jury accurately, once the defense adduced some proof  
5 of entrapment, the burden was then on the Government to  
6 establish beyond a reasonable doubt that the defendant  
7 was not induced by the action of the agent provocateur.  
8 I think that the proof in this case has been clear.

9 There was no rebuttal witness. Under the circumstances,  
10 I submit as a matter of law, the defendant is entitled  
11 to a directed verdict.

12 THE COURT: I will have to take a few moments  
13 to consider your motion.

14 (Recess.)

15 THE COURT: I think that the problem with your  
16 motion, Mr. Polstein, is that you made a motion at the end  
17 of the Government's case for a directed verdict of acquittal  
18 which I denied on the ground that there was evidence from  
19 which the jury could find beyond a reasonable doubt that  
20 the defendant was guilty and that was the test  
21 announced by the Second Circuit in United States against  
22 Taylor 464 F 2nd 240, 1972.

23 In that case the Court announced the test  
24 for determining whether a case should go to the jury and  
25 in that case the Court said that if the evidence is such

1 rkrf 111

2 that reasonable jurymen must necessarily have a reasonable  
3 doubt, the Judge must require an acquittal but if a  
4 reasonable mind might fairly have a reasonable doubt or  
5 might fairly not have one, the case is for the jury.

6 In this case we had two agents testifying as  
7 to what occurred that night on September 18th so there was  
8 evidence from which the jury could find beyond a reasonable  
9 doubt that the defendant was guilty.

10 Of course, in the case you also had the problem  
11 of the Government not having called Miss Adler which might  
12 be said to be evidence from which reasonable men might  
13 have a reasonable doubt, so we had both of those problems  
14 in this case, but as I have indicated, there was evidence  
15 from which the jury could find beyond a reasonable doubt  
16 that the defendant was guilty.

17 The case properly went to the jury, and then we  
18 got the note, Court's Exhibit 10 which the jury said,  
19 "We the jury are deadlocked."

20 I asked the forelady whether she thought with  
21 a little more time they could reach a verdict and of course  
22 she went too far but certainly the essence of it was, they  
23 could not.

24 So, the motion is denied and a mistrial as I  
25 say has been granted. We will have to set a date for a new



1 rkrf 112

2 trial.

3 MR. POLSTEIN: I assume the bail conditions are  
4 continued.

5 MR. CAREY: Mr. Polstein made a request that  
6 the bail conditions be continued. The Government would con-  
7 sent to that request.

8 THE COURT: All right.

9 (Adjourned.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

EXHIBIT B--EXCERPTS FROM TRIAL TRANSCRIPT ANNEXED TO  
AFFIDAVIT OF ROBERT POLSTEIN

dhrrf

Meale - cross

31

A Yes, we do.

Q Do you assign numbers to those informers?

A Yes, we do.

Q The Drug Enforcement Administration has a list  
of informers and they are all given numbers?

A Yes.

Q Is Mary Adler an informer for your bureau?

THE WITNESS: Do I have to answer that?

A Yes, she is.

Q Does she have a number assigned to her by the  
Drug Enforcement Administration?

A Yes, she does.

Q What is Mary Adler's informer's number?

MR. CAREY: Your Honor, if the witness knows,  
your Honor, I have no objection.

A I --

MR. POLSTEIN: Thank you, Mr. Carey.

THE COURT: What is the relevance anyway of a  
number? A number has what relevance, Mr. Polstein? He's  
testified that Mary Adler was an informer for the Drug  
Enforcement Administration. What relevance is it as  
to what her Government informer number is?

MR. POLSTEIN: Because document No. 3506 that Mr.  
Carey so kindly turned over to me a few moments ago refers



1 dhrf

Meale - cross

32

2 to a number and I want to find out is that Mary Adler.  
3 This is this man's report.

4 THE COURT: All right.

5 Do you know the number?

6 THE WITNESS: I believe I do. I might not recall  
7 it exactly. It's SC 10137 or 87.

8 Q SC 1-30187?

9 A Yes, I believe so.

10 Q That's Mary Adler's number?

11 A Yes.

12 Q When did Mary Adler become an informer for the  
13 DEA?

14 A I personally don't know that.

15 Q When did you meet Mary Adler for the first time?

16 A I saw her approximately a week or two weeks  
17 prior to September 18th.

18 Q Who introduced you?

19 A Agent Lightcap.

20 Q Where did you meet Mary Adler?

21 A I wasn't formally introduced to her until  
22 September 18th.

23 Q But you met this young woman through your  
24 partner, Agent Lightcap; is that right?

25 A That is correct.

dhrf

Neale - cross

33

1

2

Q Did Lightcap tell you, "This is Mary Adler"?

3

A Yes, he did.

4

Q Did he tell you she was an informer for

5

the DEA?

6

A Yes, he did.

7

Q Did he tell you that she was trying to set up

8

a cocaine deal for him?

9

MR. CAREY: Objection, your Honor.

10

THE COURT: Yes, that calls for a conclusion

11

on the part of the witness.

12

MR. POLSTEIN: No, ma'am. I asked what Agent

13

Lightcap told him.

14

THE COURT: Well, that's a good question. Ask

15

him what Agent Lightcap told him.

16

MR. CAREY: Your Honor, I object on the ground

17

of hearsay.

18

THE COURT: Well, Agent Lightcap's going to be

19

here, isn't he, to be cross examined and testify?

20

MR. CAREY: Yes, your Honor.

21

Q You met Mary Adler at any rate through Agent

22

Lightcap?

23

A Yes.

24

Q Is that right?

25

A Yes, I did.



dhrf

Meale - cross

46

1  
2 You are stating now that regardless of what  
3 you said in the grand jury October 4th of last year  
4 it is your sworn testimony now that Mary Adler received  
5 two in-coming calls while you were at that apartment that  
6 evening before Beckerman showed up?

7 A That is correct.

8 Q I'm sorry.

9 A That is correct.

10 Q And is that testimony just as truthful as all  
11 the other testimony you have given so far?

12 A Yes, it is.

13 MR. POLSTEIN: I don't know if I have made this-  
14 clear. I've been using the initials DEA and whenever  
15 I use them, your Honor, I'm intending to refer to the Drug  
16 Enforcement Administration. I trust the jury understands  
17 that.

18 Q Do you know whether Mary Adler was being paid  
19 by the DEA for the service she was performing as an  
20 informer?

21 A I found out later that she was.

22 Q She was being paid. And how did you find that  
23 out?

24 A After the arrest of Peter Beckerman in discussing  
25 the case with Agent Lightcap. During this time is when

1 dhrf

Meale - cross

47

2 I found out that the informant had been paid.

3 Q Now, Mr. Meale, isn't it a fact that the very  
4 first time you heard Peter Beckerman's name was that night,  
5 September 18th?

6 A No, it is not.

7 Q Had Agent Lightcap and you discussed this  
8 investigation?

9 A The name --

10 Q You can answer that yes or no. Had you discussed  
11 this investigation?

12 A I can't -- I have to quarrel with that because I  
13 was told about the investigation the night of the 18th.

14 Q By whom?

15 A By Agent Lightcap.

16 Q So it was Agent Lightcap's continuing investiga-  
17 tion, in other words, and you got into it on the night  
18 of the actual arrest?

19 A Yes, that is correct.

20 Q All right. Fine. I will save questions on  
21 that then for Agent Lightcap.

22 Now, I'm referring you back to when you were  
23 at the apartment. Both of these phone calls, you say,  
24 came into the apartment before Mr. Beckerman arrived?

25 A That is correct.



EXHIBIT C--EXCERPT FROM TRIAL TRANSCRIPT ANNEXED TO  
AFFIDAVIT OF ROBERT POLSTEIN

rkrf

213

the contacts to get Peter Beckerman into this apartment contends that Mr. Beckerman invited the contacts which were subsequently made by Mary Adler or between Mary Adler and Mr. Beckerman.

THE COURT: Yes, that goes to whether he was predisposed, whether there was any evidence he was predisposed.

Anything else?

MR. CAREY: Nothing.

THE COURT: Are you ready to proceed?

MR. POLSTEIN: Yes. I will call Agent Lightcap as my first witness.

(Jury present.)

THE COURT: I believe the clerk has gone to get the defendant's first witness.

The Government having rested, we will now proceed with the defendant's case.

MR. POLSTEIN: I call Agent Lightcap.

I R V I N L I G H T C A P, a witness called

by the defense, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POLSTEIN:

Q Agent Lightcap, is Mary Adler presently in this

1 rkrf

Lightcap - direct

214

2 building, to your knowledge?

3 A Yes, she is.

4 MR. POLSTEIN: No further questions.

5 THE COURT: Do you have any cross examination?

6 MR. CAREY: No, your Honor.

7 THE COURT: You may come down.

8 (Witness excused.)

9 MR. POLSTEIN: Linda Burns

10 L I N D A B U R N S, a witness called by  
11 defendant, being first duly sworn, testified as  
12 follows:

13 DIRECT EXAMINATION

14 BY MR. POLSTEIN:

15 Q Miss Burns, where were you born?

16 A London, England.

17 Q Are you a citizen of this country?

18 A No, resident.

19 Q You realize you are about to give testimony  
20 under oath?

21 A Yes.

22 Q If you testified falsely, that would subject you  
23 to denortation proceedings?

24 A Yes.

25 Q Do you know the defendant Peter Beckerman?



EXHIBIT D--JUDGE'S CHARGE ANNEXED TO AFFIDAVIT  
OF ROBERT POLSTEIN

rkrf pm 63

AFTERNOON SESSION1:30 p.m.

(In open court, jury present.)

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, first of all I want to thank you for your patience and for your cooperation in being prompt. I know that in order to serve on this jury, each of you has had to make some personal or business sacrifice in order to do so, but you may recall when the trial commenced, I reminded you that we all have a stake in the fair and impartial administration of justice, so that I am sure any business or personal sacrifice that you have had to make in order to be here, you were glad to do so in the interest of the fair and impartial administration of justice.

Before formally beginning the charge, I would like to thank counsel and both sides for their patience with the Court and to congratulate each of them on the high degree of professional skill that each has demonstrated throughout this trial.

Now, I trust that you will bear with me, ladies and gentlemen and give me that same degree of attention which you have given throughout the trial so that you may carefully understand the legal principles which you

1 r krf 64

2 are to apply to the facts in this case as you find them.

3 As you approach the performance of your function  
4 in this case which is to determine the guilt or innocence  
5 of the defendant who is on trial, I want to remind you  
6 that it is your duty to weigh the evidence calmly and  
7 dispassionately without sympathy or prejudice for or against  
8 either the defendant or the Government in this case.

9 Every defendant appearing before the Court is  
10 entitled to a fair and impartial trial regardless of his  
11 occupation or station in life.

12 The fact that the case is brought by the Government  
13 here, that is, that the action is entitled The United States  
14 of America versus Peter Beckerman, entitles the Government  
15 to no greater consideration than that accorded to any  
16 other litigant in a lawsuit. By the same token, it is  
17 entitled to no less consideration than any other litigant  
18 in a lawsuit. That is to say, all parties, Government and  
19 individuals alike stand equal before the law.

20 There is only one charge made in the indictment  
21 in this case and your verdict as to that charge must be either  
22 guilty or not guilty, and that verdict must be based solely  
23 upon the evidence presented in this case and as I told you  
24 before the evidence in the case, it is the testimony that  
25 you heard from the witnesses who took the witness stand,



1 rkrf 65

2 any exhibits actually received in evidence and any stipula-  
3 tions as to certain facts which the lawyers may have entered  
4 into.

5 You as jurors are the sole and exclusive judges  
6 of the facts. That means that you pass upon the weight  
7 of the evidence. You determine the credibility of the  
8 witnesses. That is, you determine who is telling the  
9 truth and who is not and who has given you the correct  
10 picture of exactly what occurred here. As tryers of the  
11 fact, you resolve such conflicts as there may be in the  
12 evidence or in the testimony and you as the tryers of the  
13 fact draw such reasonable inferences as may be warranted  
14 by the testimony or other evidence in the case.

15 Again, with respect to any matter of fact,  
16 it is your recollection and yours alone that governs. Any-  
17 thing that counsel for the Government may have said or  
18 anything that counsel for the defendant may have said with  
19 respect to any matter of fact, whether stated in their  
20 opening statement, during the course of the trial or in  
21 the summations which you have just heard, is not to be  
22 substituted by you in lieu of your own independent  
23 recollection of what the evidence shows .

24 So too, anything that the Court may have said  
25 during the course of the trial or may refer to during these

1 rkrf 66

2 instructions, that is, any matter of fact, is not to be  
3 substituted by you in lieu of your own recollection as to  
4 what the facts are.

5 The fact that I refer to some of the testimony  
6 during the course of these instructions does not mean that  
7 I think that that is the only testimony you should consider,  
8 or the most important.

9 In deciding the guilt or innocence of this  
10 defendant, you should consider all the testimony, both  
11 direct and cross examination and you must consider the con-  
12 tentions of both parties as set forth in the summations  
13 which you have just heard.

14 My function is to instruct you as to the law and  
15 you should accept the law as I state it to you in these  
16 instructions and apply it to the facts as you find them.

17 Now, the logical result of that application is a  
18 verdict in the case and I want to caution you that you  
19 are not to single out any one instruction alone as  
20 stating the law, but you must consider these instructions  
21 as a whole .

22 You are not to assume that I have any opinion  
23 as to the guilt or innocence of this defendant  
24 or the truth or falsity of the charges. That is for the  
25 jury to determine. The fact that I have denied motions



1 rkrf 67

2 or granted motions in the course of the trial is not  
3 to be taken by you as any indication that the defendant  
4 is believed by the Court to be guilty or innocent. These  
5 motions are matters of law with which you as jurors  
6 have no concern.

7 If during the course of the trial a question was  
8 asked and an objection interposed and I sustained the ob-  
9 jection, you are to disregard the question and any alleged  
10 facts contained in that question.

11 Similarly, if I ruled that an answer be stricken  
12 from the record, you are to disregard both the question  
13 and the answer in your deliberations.

14 Now, you remember when the trial commenced I told  
15 you that in a criminal case, the Government has the burden  
16 of proof and that is to prove the defendant guilty of a  
17 charge beyond a reasonable doubt.

18 I want to tell you what is meant by the term  
19 reasonable doubt. Placing the burden on the Government of  
20 proving the defendant guilty beyond a reasonable doubt  
21 means that the Government has a burden which never shifts.  
22 It remains upon the Government throughout the entire trial.  
23 As I told you before, in a criminal case a defendant  
24 does not have to prove his innocence. On the contrary,  
25 he is presumed to be innocent of the accusations

1 rkrf 68

2 contained in an indictment.

3 This presumption of innocence was in his favor  
4 at the start of the trial, remains in his favor throughout  
5 the trial, is in his favor even as I instruct you now. It  
6 remains in his favor even when you retire to the jury  
7 room to deliberate.

8 Now, the presumption of innocence is removed  
9 only if and when the jury, after its deliberations,  
10 is convinced that the Government has sustained its burden  
11 of proof. That is to prove the defendant guilty beyond  
12 a reasonable doubt.

13 The question which naturally comes up is, what is  
14 a reasonable doubt? The words almost define themselves.  
15 Reasonable doubt is a doubt founded in reason and arising  
16 out of the evidence in the case or the lack of evidence.  
17 It is a doubt which a reasonable person has after carefully  
18 weighing all the evidence.

19 The kind of doubt which would make one hesitate  
20 to act. It means a doubt which is substantial and not  
21 merely shadowy.

22 Reasonable doubt is one which appeals to your  
23 reason and your judgment and your common sense and your  
24 experiences in life. It is not caprice, whim or speculation.  
25 It is not an excuse to avoid the performance of an unpleasant



1 rkrf 69

2 duty. It is not sympathy for a defendant.

3 If after a fair and impartial consideration of  
4 all the evidence you can candidly and honestly say that  
5 you are not satisfied of the guilt of this defendant and  
6 that you do not have an abiding conviction as to this  
7 defendant's guilt, such a conviction as you would be  
8 willing to act upon unhesitatingly in importance and weighty  
9 matters in the personal affairs of your own life, then  
10 you have a reasonable doubt and in that circumstance, it is  
11 your duty to acquit the defendant.

12 On the other hand, if after such a fair and  
13 impartial consideration of all the evidence you can candidly  
14 and honestly say that you are satisfied of the guilt  
15 of this defendant, that you do have an abiding conviction  
16 as to this defendant's guilt, such a conviction as you  
17 would be willing to act upon unhesitatingly in important  
18 and weighty matters in the personal affairs of your  
19 own life, then you have no reasonable doubt and in that  
20 circumstance, you may convict this defendant.

21 Now, a reasonable doubt does not mean a positive  
22 certainty or beyond all possible doubt. It is practically  
23 impossible for a person to be absolutely and completely  
24 convinced of any controverted fact, which by its nature  
25 is not susceptible to mathematical certainty.

1 rkrf 70

2 In consequence, the law in a criminal case is,  
3 it is sufficient if the guilt of a defendant is established  
4 beyond a reasonable doubt, not beyond all possible doubt.

5 Now, I want to tell you about how you determine  
6 the credibility of the witnesses who have testified  
7 here before you. You know, of course, there is no automatic  
8 way to decide who is telling the truth and who is not.  
9 Credibility can be equated with believability and reliability

10 If a witness is credible, you say he is believable  
11 and reliable. If he is incredible, you say he is  
12 unbelievable. There is nothing mysterious about these  
13 words.

14 Now, by what yardstick are you to judge the  
15 credibility of the witnesses? Each of you has given careful  
16 attention to the testimony as it came from the witnesses  
17 themselves. You observed the witnesses. They were sitting  
18 right here before you.

19 Issues of fact are presented for your determination  
20 and to a large extent, the resolution of them depends  
21 upon the credibility of the witnesses and the support or  
22 lack of support they receive from other evidence in the  
23 case.

24 Your duty is to decide the issues of fact.  
25 An issue of fact is presented, for example, when one



1 rkrf 71

2 witness testifies that a certain event occurred and  
3 another witness testifies that it did not occur.

4 Now, the thing for you to do, is to use your  
5 logic, your reason and your common sense, and don't be side-  
6 tracked or diverted or distracted by what you consider to  
7 be a minor or insignificant detail or irrelevancy, or by  
8 what you consider to be an appeal not to your reason or  
9 logic but to mere sentimentality, or unthinking passion.

10 I repeat, use your common sense. You should  
11 carefully scrutinize all the testimony given, both the  
12 direct and cross examination. The circumstances under  
13 which each witness has testified and every matter in  
14 evidence which tends to show whether the witness is worthy  
15 of belief.

16 Consider each witness' intelligence, motive and  
17 state of mind and demeanor and manner while on the witness  
18 stand. Consider each witness' ability to observe the  
19 matters as to which he has testified and whether he  
20 impresses you as having an accurate recollection of these  
21 things.

22 Consider also any relation each witness may  
23 bear to either side of the case. The manner in which each  
24 witness might be affected by the verdict and extent to  
25 which if at all each witness is either supported or

1 rkrf 72

2 contradicted by other evidence in the case.

3 Inconsistencies in the testimony of a witness  
4 or between the testimony of different witnesses may or may  
5 not cause the jury to discredit such testimony. Two or  
6 more persons witnessing an incident or transaction may see  
7 or hear it differently an innocent misrecollection, like  
8 failure of recollection is not an uncommon experience.

9 In weighing the effect of a discrepancy, always  
10 consider whether it pertains to a matter of importance or  
11 an unimportant detail and whether the discrepancy results  
12 from innocent error, or intentional falsehood.

13 In determining the weight to be given to the  
14 testimony of any witness, you should also consider the  
15 testimony of the different witnesses. The mere fact  
16 that they are employees of the Government entitles them  
17 to no more and no less consideration than any other  
18 witness, nor should you be influenced by the number of  
19 witnesses a side has called or the number of exhibits  
20 received in evidence.

21 It is the quality of the testimony and other  
22 evidence which counts, not the quantity. After making  
23 your judgment, you will give the testimony of each witness  
24 such credibility if any as you think it deserves.

25 If you find that any witness, and this applies



1 rkrf 73

2 to all witnesses who have testified here has wilfully  
3 testified falsely as to any material matter, you may  
4 reject the entire testimony of that witness, or you may  
5 accept such part or portion as commends itself to your  
6 belief for which you find corroborated by other evidence  
7 in the case.

8 The law does not compel a defendant in a criminal  
9 case to take the witness stand and testify. And  
10 no presumption of guilt may be raised and no inference of  
11 any kind may be drawn from the failure of a witness to  
12 testify.

13 However, a defendant who wishes to testify may do  
14 so and is a competent witness. The defendant's testimony  
15 is to be judged in the same way as that of any other  
16 witness as I have just described for you.

17 In this case there has been testimony with regard  
18 to the use of a person referred to as an informer or an  
19 informant and that was Mary Adler. The services of informant  
20 are availed of by the Government and its agents at times  
21 to make narcotics purchases and to obtain introductions  
22 to persons suspected of violating the narcotics laws so  
23 that the agents themselves can make undercover purchases.

24 Violations of the narcotics laws are the types  
25 of crimes where, without the use of informants, detections

1 rkrf 74

2 would be extremely difficult. The law from time immemorial  
3 has permitted the use of informants, provided the rights  
4 of a defendant are not violated.

5 Now, you are not being called upon to determine  
6 or say whether you approve or disapprove of the use of  
7 informants but as I have indicated, the Government often uses  
8 informers in drug cases and there is nothing wrong legally  
9 with the use of informers.

10 So, the use of informers is not to enter into  
11 your discussions.

12 There has also been a great deal of discussion  
13 about the Government's failure to call as a witness the  
14 informer, Mary Adler. The law is, that if the Government  
15 has failed to call a witness who is equally available to both  
16 sides, you may not draw an inference that his or her testimony  
17 would have been unfavorable to the Government. There is  
18 no presumption against the Government from its failure  
19 to call witnesses if it should appear to you that their  
20 testimony would be merely cumulative or repetitive  
21 and have no greater value than that of witnesses who have  
22 testified.

23 The law does not impose upon a defendant the duty  
24 to call any witnesses who are shown to have been present  
25 at any of the events involved in the evidence or may



1 rkrf 75

2 appear to have some knowledge of the matters in question.  
3 Both sides have the right to interview witnesses at any  
4 time before and during the trial. Both sides have the  
5 right to subpoena or request witnesses to appear in court.

6 I want to tell you about circumstantial evidence  
7 because a great deal of the evidence in this case is what  
8 we call circumstantial evidence and as you may know, there  
9 are two classes of evidence recognized and admitted in  
10 courts of justice upon which either an accused may be  
11 found guilty of a crime.

12 One is called direct evidence, the other is  
13 called circumstantial evidence. Direct evidence tends  
14 to show the fact in issue without need for any other ampli-  
15 fication, although, of course, there is always the question  
16 whether that evidence is to be believed.

17 Circumstantial evidence on the other hand tends  
18 to show other facts from which the fact in issue may  
19 reasonably be inferred. It is that evidence which tends  
20 to prove the fact in issue as I have said by proof of  
21 other facts which have a legitimate tendency to lead the  
22 mind to infer that the facts sought to be established  
23 are true.

24 For instance, it is sometimes difficult to  
25 tell when you are on an upper floor in a building like this

1 rkrf 76

2 whether or not by going over to the window and looking  
3 out it is raining, but if you go over to the window and  
4 look out into the street below and you see people with  
5 their umbrellas up, then you may come to the conclusion  
6 that it is raining. You have direct evidence, the evidence  
7 of your own senses that the umbrellas are up and that con-  
8 stitutes circumstantial evidence on which you are entitled  
9 to conclude that it is raining.

10 In other words, circumstantial evidence again  
11 consists of facts proved from which the jury may infer by  
12 a process of reasoning other facts in issue. It is not  
13 necessary that the participation of a defendant be shown by  
14 direct evidence. The connection may be inferred by such  
15 facts and circumstances in evidence as legitimately tend  
16 to sustain that inference.

17 Knowledge and wilfullness and intent of a  
18 defendant need not be proved by direct evidence. Like  
19 any other fact in issue, it may be established by circum-  
20 stantial evidence. The significant fact is the defendant's  
21 state of mind.

22 It is obviously impossible to prove directly  
23 the operation of a person's mind because you can't look  
24 into a person's mind and see what his or her intentions  
25 are or were, but the proof of the circumstances surrounding



1 rkrf 77

2 a defendant's activities may well supply an adequate  
3 and convincing basis for finding that the defendant acted  
4 knowingly, wilfully and intentionally.

5 The actions of a person must be put in their  
6 time and place just as the full meaning of a word is commonly  
7 understood only in its relation to other words in a sentence.

8 So the meaning of a particular act or conduct  
9 of a defendant may depend on the circumstances surrounding  
10 that act or conduct.

11 In determining the issue of intent, you are  
12 entitled to consider any statements made by the defendant  
13 which are in evidence and acts done by the accused and  
14 all facts and circumstances in evidence which may aid  
15 you in determining the defendant's state of mind.

16 You may consider such things as the age, background  
17 and experience of a defendant and whether such facts  
18 make it likely or unlikely, probable or improbable that  
19 a defendant fully and precisely understood what he was  
20 doing in relation to a transaction and where relevant, in  
21 relation to others.

22 Now I am going to read the indictment to you  
23 and explain what the Government must prove to your satisfactil...  
24 beyond a reasonable doubt before the defendant can be con-  
25 victed of the crime charged here.

1 rkrf 78

2 With respect to the indictment, I want to remind  
3 you of what I said at the commencement of the trial and that  
4 is, that an indictment is not proof or evidence. It is  
5 merely an accusation. It is a technique or method or proce-  
6 dure which we employ in our system whereby one who is  
7 accused by a grand jury of a crime is brought into court  
8 and then their guilt or innocence is determined by a  
9 trial jury or petit jury such as you are.

10 The indictment reads as follows:

11 The Grand Jury charges on or about the 18th day  
12 of September, 1973 here in the Southern District of New  
13 York, Peter Beckerman the defendant unlawfully, intentionally  
14 and knowingly did distribute and possess with intent to  
15 distribute a Schedule 2 narcotics drug controlled substance,  
16 to wit, approximately 28.04 grams of cocaine hydrochloride.

17 The indictment cites a statute which indicates  
18 the law which is violated according to this charge and  
19 that is Title 21 United States Code Section 841A1.  
20 That statute provides in pertinent part as follows. It  
21 reads:

22 "It shall be unlawful for any person knowingly  
23 or intentionally to distribute or possess with intent to  
24 distribute a controlled substance."

25 Then in another section of the law Title 21 Section



1 rkrf 79

2 812, it is provided in pertinent part that there are estab-  
3 lished by that Section 5 schedules of controlled substances.  
4 to be known as Schedule 1, 2, 3, 4 and 5 and such schedules  
5 shall initially consist of the substances listed in that  
6 schedule.

7 In Schedule 2, cocaine is listed as a controlled  
8 substance and as I said, the indictment charges that  
9 Mr. Beckerman violated that statute.

10 The defendant claims that he is not guilty of  
11 the charge made in the indictment because he was entrapped  
12 by the Government's agents into committing the crime  
13 charged.

14 In this connection, the defendant claims that he  
15 was not involved in the drug traffic. He never sold drugs  
16 before, he had no predisposition to commit any such crime  
17 and admonished Mary Adler about getting involved with  
18 people interested in drugs..

19 If you find defendant's claim is true, then the  
20 fact that he was entrapped will in law excuse his crime  
21 and later I will instruct you on the law of entrapment.

22 Defendant further claims that the Government has  
23 failed to establish a necessary element of the crime, and  
24 that is, that defendant intended to distribute the  
25 cocaine.

1 rkrf 80

2 Defendant denies that he intended to distribute  
3 the cocaine.

4 Now, before you can find the defendant guilty of  
5 the crime charged in the indictment, you must be convinced  
6 beyond a reasonable doubt that the Government has proved  
7 each of the four following elements of that crime.

8 First, that on or about September 18, 1973, the  
9 defendant did possess a controlled substance.

10 Second, that on or about September 18, 1973 the  
11 defendant did intend to distribute the controlled substance.

12 Third, that the defendant did sell unlawfully,  
13 wilfully, knowingly and intentionall.

14 Four, that the substance which is Government's  
15 Exhibit 1 is in fact a controlled substance.

16 I want to discuss in further detail some of those  
17 elements. You will note that the first element of the  
18 offense is possession of a controlled substance. What is  
19 meant in the law by possession? The law recognizes two  
20 kinds of possession. Actual possession and constructive  
21 possession. The person who knowingly has direct physical  
22 control over a thing at a given time is then in actual  
23 possession of it.

24 A person who though not in actual possession,  
25 knowingly has both the power and intention at a given



1 rkrf 81

2 time to exercise dominion and control over a thing either  
3 directly or through another person or persons is in construc-  
4 tive possession of it.

5 The law also recognizes that possession may  
6 be joint or sole. If one person alone has actual or con-  
7 structive possession of a thing, possession is sole.  
8 If two or more persons share actual or constructive  
9 possession of a thing, possession is joint.

10 If you find beyond a reasonable doubt from  
11 the evidence in the case that the accused, that is, Mr.  
12 Beckerman, either alone or jointly with others was in actual  
13 or constructive possession of the controlled substance which  
14 is Government's Exhibit 1, then you may find that such  
15 was in the possession of the defendant.

16 You will note that the second element is  
17 that defendant did possess the controlled substance with  
18 intent to distribute that controlled substance. The word dis-  
19 tribute means to deliver other than by administering or  
20 dispensing the narcotic control substance.

21 The word intent refers to a person's state of mind.  
22 So the term possess with intent to distribute can be  
23 fairly stated to mean to control an item with the state  
24 of mind or purpose to transfer or deliver that item.

25 In order to convict a defendant in any criminal

1 rkrf 82

2 case, you must find beyond a reasonable doubt that he  
3 acted unlawfully, knowingly and wilfully.

4 Now, unlawfully means obviously contrary to  
5 law. An act is done knowingly if it is done voluntarily  
6 and purposefully and not because of mistake, accident,  
7 mere negligence or other innocent reason.

8 An act is done wilfully if it is done  
9 knowingly, deliberately, intentionall and with an evil motive  
10 or purpose.

11 In determining whether a defendant has acted wil-  
12 fully, it is not necessary for the Government to establish  
13 that the defendant knew that he was breaking any particular  
14 law or any particular rule, but it must show a bad purpose  
15 or motive on the part of the defendant.

16 As I have said, knowledge and wilfulness and  
17 intent of a defendant need not be proved by direct evidence.  
18 Like any other fact in issue, it may be established by  
19 circumstantial evidence.

20 Now we come to the fourth and final element.  
21 As to the fourth element, the indictment charges that  
22 the Schedule 2 controlled substance is cocaine hydrochloride.

23 As you know, there has been a stipulation entered  
24 into by the lawyers on both sides to the effect that if a  
25 chemist were called to testify, he would testify that



A 65  
Exhibit D

1 rkrf 83

2 Government's Exhibit 1 in evidence is cocaine as a result  
3 of his analysis.

4 Now, I instruct you as a matter of law that cocaine  
5 hydrochloride is a controlled substance as I read it to you  
6 or pointed out to you earlier from the statute.

7 You, however, must find beyond a reasonable doubt  
8 that the substance contained in Government's Exhibit 1  
9 is cocaine hydrochloride.

10 Now as I pointed out and as you may recall from  
11 the evidence and arguments of counsel, a principal issue  
12 in this case is whether the defendant intended to distribute  
13 the cocaine. If you should find beyond a reasonable doubt  
14 that defendant possessed the cocaine as I have said, then  
15 you must next consider the evidence relating to  
16 defendant's intentions as to the substance he possessed.

17 You are instructed again, that with respect to  
18 an individual's state of mind, you may rely on circumstantial  
19 evidence. This is so because direct proof as to the workings  
20 of an individual's mind are ordinarily unavailable and unknow  
21 able to other persons because you can't look into a person's  
22 mind and see what his or her intentions are or were.

23 If you are convinced beyond a reasonable doubt  
24 that defendant intended to distribute cocaine, then you  
25 must find that the second element has been established.

1 rkrf 84

2 I want to point out that the statute under which  
3 defendant is charged does not require that a sale be  
4 consummated, although obviously that would be the strongest  
5 proof regarding the intent to distribute. Whereas  
6 here, no sale has been established, nor alleged a jury  
7 must rely on circumstantial evidence to come to some con-  
8 clusion regarding the defendant's intent to distribute.

9 In this regard, it is the Government's claim that  
10 you can infer the necessary state of mind of the defendant  
11 from the following evidence in the case.

12 The first is, the defendant's testimony that he  
13 got the package from Craig Bryant after Mary Adler called  
14 defendant.

15 Then the Government has pointed to the agent's  
16 testimony as to what transpired in Mary Adler's apartment;  
17 that he talked to defendant about purchasing cocaine in the  
18 future and that the defendant said that he didn't want  
19 to break up the package by giving the agent a sample.

20 Then the Government points to the testimony of  
21 the agent that the defendant offered to let the agent  
22 test the cocaine in the kitchen.

23 Then the Government points to the agents' testimony  
24 as to defendant's familiarity with the language of the  
25 drug trade, specifically, that the cocaine he was offering



1 rkrf 85

2 could be hit three times in their discussion regarding Chilean.  
3 rock and Brazilian flake or whatever the expressions were.

4 Defendant, on the other hand, contends that no  
5 inference as to his state of mind can be reasonably drawn  
6 from this evidence and that it was not his intention to  
7 distribute the cocaine.

8 Defendant points to his testimony that he  
9 intended only to take the package back to Craig Bryant,  
10 that he urged Mary Adler not to get involved with the man  
11 in her apartment, and he points to his testimony that  
12 he went to the apartment only to put the people who  
13 were harassing Mary Adler out of her apartment.

14 Now, if you find that the Government has failed  
15 to establish any one of the four essential elements  
16 which I have just enumerated and discussed for you in  
17 detail beyond a reasonable doubt, then you must acquit this  
18 defendant.

19 If, on the other hand, you find that the  
20 Government has established each and every one of these  
21 essential elements beyond a reasonable doubt, then you may  
22 find the defendant guilty.

23 As I told you, I want to instruct you on the law  
24 of entrapment because that is a special legal defense which  
25 will excuse the commission of a crime.

1 rkrf 86

2 As you know, the defendant here asserts as a  
3 defense to the charge that he was a victim of entrapment  
4 by a Government agent, that is, Mary Adler and the other  
5 agents.

6 The word entrapment as I have said has a legal  
7 meaning, a technical meaning, and it does not have the  
8 meaning of popular speech or colloquial ordinary usage.

9 Therefore I must explain the meaning of entrapment  
10 as that term is used in law.

11 Criminal activity is such that sometimes stealth  
12 and strategy are necessary methods to be used by law  
13 enforcement officers. The function of law enforcement is  
14 not only the prevention of crime, but also the detection  
15 and apprehension of criminals.

16 Now, manifestly that function does not include the  
17 manufacturing of crime by Government agents. The defense  
18 of entrapment is based upon the policy of the law not  
19 to ensnare or entrap innocent persons into commission of  
20 a crime, but a line must be drawn between the entrapment  
21 of the unwary innocent and the trap for the unwary criminal.

22 A basic feature of entrapment is, that the idea  
23 or design of committing the crime originated with the  
24 law enforcement officer or Government informer rather than  
25 with the defendant.



1 rkrf

2 Putting it another way, in entrapment, it must be  
3 shown that the defendant has no previous disposition, intent.  
4 or purpose to commit the alleged crime and that the law  
5 enforcement office or Government employee implanted in the  
6 mind of an innocent person, the disposition to commit the  
7 alleged offense and instigated and incited its commission  
8 in order that the defendant might be arrested and prosecuted.

9 If you find that an agent or employee of the  
10 Government merely afforded a favorable opportunity to a  
11 defendant for the commission of the alleged crime, such con-  
12 duct on the part of the Government does not constitute entrap-  
13 ment.

14 Entrapment would occur only if you find that the  
15 Government agent induced the defendant to commit the  
16 crime charged in the indictment and that the criminal  
17 conduct of the defendant was the product of Government  
18 activity.

19 If the jury finds any credible evidence creating  
20 the reasonable possibility that a Government agent or  
21 employee instigated and incited or otherwise induced the  
22 defendant to commit the crime charged, then the Government  
23 must prove beyond a reasonable doubt that such inducement  
24 was not the cause or the creator of the crime. That is  
25

1 rkrf 88

2 the Government must prove beyond a reasonable doubt  
3 that the defendant had been predisposed and willing to  
4 commit the crime.

5 In other words, expressing the same thought, while  
6 a defendant is not required to prove his entrapment beyond  
7 a reasonable doubt, the Government must prove its absence  
8 beyond a reasonable doubt and if you have a reasonable  
9 doubt as to the absence of entrapment and find a reasonable  
10 possibility of entrapment, you must acquit the defendant.

11 If the prosecution has satisfied you beyond  
12 a reasonable doubt that defendant was ready and willing to  
13 commit the offense charged and was merely awaiting a favorable  
14 opportunity to commit the offense, then you may find that  
15 the inducement if any which brought about the actual  
16 offense was no more than the providing of what appeared  
17 to the defendant to be a favorable or timely or convenient  
18 opening for the criminal activity in which the defendant  
19 engaged.

20 In such circumstances, you may find that the  
21 Government's agent has not seduced an innocent person, but  
22 has only provided the means for the defendant to effectuate  
23 or realize his own then existing purpose.

24 The jury is not to consider or in any way speculate  
25 about the punishment which a defendant may receive if found



A 71  
Exhibit D

1 rkrf 89

2 guilty. The function of a jury is to determine the guilt  
3 or innocence of a defendant on the basis of the evidence  
4 and the Court's instructions. It is for the Judge alone  
5 or the Court has the duty of determining the sentence  
6 if there is a conviction.

7 The most important part of this case, ladies and  
8 gentlemen, is the part which you are now about to play,  
9 because as I have said, it is four you and you alone to  
10 determine whether the defendant is guilty or not guilty.  
11 I know you will try the issues that have been presented  
12 to you according to the oath which you have taken as jurors  
13 and in that oath, you promised that you would well and truly  
14 try the issues joined in this case and a true verdict  
15 render.

16 I suggest to you that if you follow that oath  
17 and try the issues without combining your thinking with  
18 any emotions, you will arrive at a true and just verdict.

19 It must be clear to you, once you get into an  
20 emotional state and let bias or sympathy or prejudice  
21 interfere with your thinking, then you will not arrive at  
22 a true and just verdict. As you deliberate, ladies and  
23 gentlemen, please be careful to listen to the opinions  
24 of your fellow jurors and ask for an opportunity to  
25 express your own views. No one juror holds center stage

1 rkrf 90

2 in a jury room. No one juror controls or monopolizes  
3 the deliberations.

4 If after listening to your fellow jurors and  
5 if after stating your own view you become convinced that  
6 your view is wrong, do not hesitate because of stubbornness  
7 or pride of opinion to change your view.

8 On the other hand, do not surrender your honest  
9 conviction solely because you are outnumbered.

10 As I have said, your verdict must be unanimous.  
11 It must represent the absolute conviction of each one of  
12 you.

13 Will counsel approach the bench?

14 (In the robing room.)

15 THE COURT: Do you have any exceptions to the  
16 charge?

17 MR. CAREY: I have no exceptions. I have two  
18 things to mention. If your Honor charged presumption  
19 of innocence, I didn't catch it.

20 THE COURT: What do you mean?

21 MR. POLSTEIN: She did.

22 THE COURT: I always do it at the beginning. That  
23 he is presumed innocent?

24 MR. CAREY: I just wanted to be sure it was  
25 instructed.



1 lh

2 THE COURT: The Court denies the motion for the fol-  
3 lowing reasons: First, this was a very short trial. The  
4 Government called two witnesses whose testimony consumed only  
5 a few hours.

6 MR. CAREY: Your Honor, I believe the Government  
7 called three witnesses.

8 THE COURT: All right. The Government called three  
9 witnesses, whose testimony consumed only a few hours. The  
10 defendant called four witnesses, and the reporter indicates  
11 that he can supply for the record the exact amount of time  
12 involved.

13 MR. NAFTALIS: I think it was four in addition to  
14 the defendant, your Honor, so it was a total of five.

15 THE COURT: A total of five? In any event, they  
16 were all short witnesses. As the record discloses, the trial  
17 started at about 3 -- what time was it on the 8th?

18 MR. NAFTALIS: Your Honor, the trial started at  
19 11 o'clock. The jury was picked by the afternoon, so 3:15  
20 would be the time the jury was selected and opening statements  
21 would begin.

22 THE COURT: In any event, it is not disputed that id  
23 was a very short trial. Secondly, it was a one-count indict-  
24 ment involving a single defendant. Thirdly, the defense here  
25 was entrapment, which means that the defendant admitted the

1 lh

2 charge but claimed simply that he had been entrapped by a  
3 Government witness.

4 The jury during the course of its deliberations  
5 asked to have the charge on entrapment re-read, which the  
6 Court re-read. It asked to have the Court's charge with  
7 respect to failure to call a witness re-read, where there was  
8 a question directed to that problem, and the Court re-read  
9 that. The jury also asked that certain testimony be read,  
10 which was read.

11 The jury went out at 2:35 in the afternoon, recessed  
12 for dinner for about an hour and a half and then at 9:15 sent  
13 out a note saying that the jury was deadlocked. Each time the  
14 Court received a note from the jurors, the lawyers were called  
15 in and the note was discussed before the jury was brought in  
16 to get the lawyers' views.

17 In this instance, when the note was sent out by the  
18 jury, the Court called the lawyers again and told them what the  
19 note said. The Government objected, defense counsel did not  
20 object. From that the Court construed the defendant's silence  
21 as agreement with the Court that enough time had passed.

22 The Court called in the jurors and asked the fore-  
23 lady whether she thought with additional time the jury could  
24 reach a verdict. Of course, the forelady improperly began to  
25 tell the Court about the deliberations; that is, it is the



1 lh

36

2 Court's recollection that the forelady said, "Some of the jurors  
3 are of the view that they didn't have enough evidence."

4 The Court then put the question again to the fore-  
5 lady with respect to whether she thought with additional time  
6 they could reach a verdict, and the forelady replied, "The  
7 way it seems now, it doesn't seem as though we will be able to."

8 In addition, no member of the jury suggested that  
9 additional time would result in a verdict in that case. Of  
10 course, they were all present when I twice put the question to  
11 the forelady.

12 So I think that in view of all the circumstances in  
13 the case, the jury was properly discharged in this case and a  
14 mistrial declared.

15 As I have indicated, the reporter has agreed to  
16 supply the exact time that the trial took. It is my recollec-  
17 tion that the opening statements were very brief and the record  
18 discloses that the closing statements were fairly brief, and  
19 the testimony, as I indicated, on the part of the Government  
20 took a matter of a few hours and the same with respect to the  
21 five -- if there were five -- defense witnesses. But the  
22 reporter can supply that, the exact time, in connection with  
23 this oral opinion and it will become a part of the record.

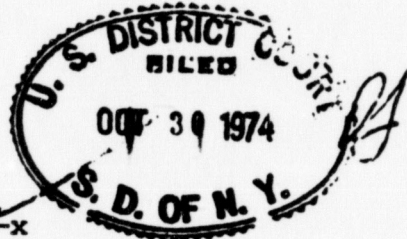
24 Thank you.

25 (Court adjourned.)

A 76

ORDER DENYING MOTION TO DISMISS INDICTMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
UNITED STATES OF AMERICA

-against-

PETER BECKERMAN,

Defendant.  
-----x

:  
:  
:  
73 CR. 939  
:  
:  
:  
-x

O R D E R

For all the reasons stated on the record at the hearing held on September 27, 1974, defendant's post-trial motion to dismiss the indictment on the ground that it violates his Fifth Amendment right against double jeopardy, is denied.

Dated: New York, New York

October 23, 1974

SO ORDERED

*Constance Baker Motley*  
\_\_\_\_\_  
CONSTANCE BAKER MOTLEY  
U. S. D. J.



Enclosed hereby are *one* copies

of the within *APPENDIX* is hereby

dated the *26th* of *DECEMBER* 1974

*12-26-74* *Copy Recd* .....

Attorney for *APPELLER*

PAUL J. CURRAN